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United States Circuit Court of Appeals

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THE EQUITABLE TRUST COMPANY OF NEW YORK, *Plaintiff,* vs WESTERN PACIFIC RAILWAY COMPANY, *Defendant.*	Appeal.
In the Matter of the Petition of the Equitable Trust Company of New York, as Trustee, for a Writ of Mandamus to be issued and directed to Honorable William C. Van Fleet, Judge of the District Court of the United States for the Northern District of California, and to said District Court.	Petition for Mandate.
Ex Parte The Equitable Trust Company of New York, as Trustee of the First Mortgage of the Western Pacific Railway Company, Plaintiff in the Action of the Equitable Trust Company of New York, as Trustee, against Western Pacific Railway Company.	Petition for Prohibition.

Memorandum of Points and Authorities to Show That Apart From Any Consideration on the Merits, 1. The Appeal Herein Should Be Dismissed; 2. The Application for a Writ of Mandamus Should Be Denied; and 3. The Application for a Writ of Prohibition Should Be Denied.

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I.

The Court Is Not Bound to Follow the Provisions of the Mortgage.

This is distinctly set forth in the very well considered case of *Low* v. *Blackford,* 87 Federal, 392, by the Circuit Court of Appeals for the Fourth Circuit. After citing a number of authorities, the Court say:

> "The authorities cited sustain the conclusion that the parties to a contract cannot, by its terms, deprive a court of equity of its right, in the due course of its proceedings, to adopt such plans concerning the sale of property as the peculiar circumstances of the case before it shall suggest to be proper for the protection of the interests of all the parties."

II.

The Appeal From the Order Enjoining the Further Prosecution of the Ancillary and Dependent Bill Should Be Dismissed for the Following Reasons:

A. The order appealed from is not appealable. Said order though nominally an injunction is in effect nothing more than an order demanding that the appellant refrain from further interference with the possession of the receivers.

1. An order appointing a receiver by necessary implication enjoins all interference with the possession of the receiver.

> "The appointment of a person receiver of property is, in effect, the issuance of a *quasi* injunction in respect to the same. High on Re-

ceivers, Secs. 163, 164, 165; *Gravenstine's Appeal,* 49 Penn. St. 310, 321."

Gilbert v. *Block* (1893), 51 Ill. App. 516, 523, 524.

"Judge *Baldwin,* in *Beverley* v. *Brooke and others,* 4 Gratt. 187, 212, held that the appointment of a receiver is in the nature of an injunction. Kerr on Receivers says (page 12): 'It operates as an injunction. An order for an injunction is always more or less included in an order for a receiver. It is not necessary if a receiver be appointed, to go on and grant an injunction in terms.'"

Smith v. *Butcher* (1877), 28 Grattan (Va.) 144, 151.

"The appointment of a receiver was a suspension of its functions and authority over its property and effects, and was equivalent to an injunction to restrain its agents and officers from intermeddling with its own property in any way. Surely this could not be done without making it a party."

Gravenstine's Appeal (1865), 49 Pa. St. 310, 321.

"The order for the receiver is itself an injunction."

Schlecht's Appeal (1869), 60 Pa. St. 172, 176.

2. An order made in a receivership proceeding enjoining interference with the possession of the receiver is not referable to the power to issue injunctions but rather to the inherent power of the court to protect possession of its receiver and is, therefore, not properly an injunction even though so called.

Woerishoffer v. *North River Const. Co.* (1885), 99 N. Y. 398; 2 N. E. 47;

Levy v. *Stanion* (1898), 53 N. Y. Supp. 473; 33 App. Div. 632;
Central Trust Co. v. *Worcester Co.* (Cir. Ct. D. Conn.), 114 Fed. 659, 665 (1902);

See, also,

Highland Ave. etc. R. Co. v. *Columbian Equipment Co.,* 168 U. S. 627; 42 L. Ed. 605.

B. If said order is properly an injunctive order it is merely confirmatory of the order made at the request of the appellant when the receivers were appointed. The latter order is not reviewable by the appellant for the two-fold reason (1) *that it was made at its request and* (2) *that the time to appeal therefrom has expired. The fact that by its order of February 21, 1916, the court reaffirmed its original order enjoining interference with the possession of the receivers gives the appellant no right of appeal.*

1. The original order enjoining interference with the possession of the receivers was made at the time of the appointment of the receivers, March 2, 1915. The time to appeal from this order expired thirty days thereafter, to-wit, April 1, 1915. No appeal having been taken therefrom the original order has long since become final.

2. The only theory upon which it could be claimed that the order of February 21, 1916, reaffirming the original order of March 2, 1915, was appealable, was that the latter order "continued in force the former order"; but a second order reaffirming the provisions of a first order can be said to "con-

tinue in force" the first order only where the first order has expired by limitation.

> "It is not at all difficult to satisfy the meaning of the expression 'order continuing an injunction'. It generally happens that a preliminary injunction expires at the entry of a decree on the merits. Such a decree may grant a perpetual injunction and yet because of an order referring questions of damages to a master still be only interlocutory in its character and not reviewable as a final appeal until the coming in of the master's report and its confirmation by the court. . . . . Such a decree would be an interlocutary decree continuing an injunction. So, too, a court may for good reasons grant an injunction until the next term of the court. An order giving the injunction force thereafter would be an order continuing an injunction because without such order the injunction would stand dissolved by lapse of the time fixed in the original order."
>
> *Kreutzer* v. *Frankfort Land Co.* (Circuit Court of Appeals, 6th Circuit), 65 Fed. 642, 645, per Taft, J.

C. The order appealed from having been made upon the initiative of the receivers upon the ground that the maintenance of the ancillary and dependent bill was an interference with the possession of the receivers, the receivers are NECESSARY parties to an appeal from that order. They have not been made parties to the appeal and, therefore, it must be dismissed.

> *Illinois Trust & Savings Bank* v. *Kilbourne, et al.* (1896), 76 Fed. 883.
>
> "Where a decree gives priority to a certain claim against an insolvent corporation, the re-

ceiver thereof, and all creditors whose claims are subordinated, and who were parties to the suit, are necessary parties to an appeal, and their absence is fatal to it." (Syllabus.)

In the opinion (p. 888), it is said:

"The receiver was clearly entitled to be heard upon the question as to whether there should be any change in the decree. So, also, were the holder of the second mortgage upon the property, and the unsecured creditors, whose claims were, by the decree appealed from, subordinated to the Sears judgment to the extent of $16,036. But that amount was not the limit of the claim of the intervening petitioners, and the setting aside of the decree appealed from might result in a larger allowance to those petitioners, and a corresponding decrease in what the holder of the second mortgage and the unsecured creditors may receive. Manifestly, therefore, those parties to the record were necessary parties to the appeal, and their absence is fatal to it. *Davis* v. *Trust Co.,* 152 U. S. 590, 14 Sup. Ct. 693; *Sipperley* v. *Smith,* 155 U. S. 86, 15 Sup. Ct. 15. Appeal dismissed."

Polk v. *Johnson* (1906), 167 Ind. 548, 78 N. E. 652.

"Where, after the resignation of a receiver, a judgment was rendered directing the receiver's successor to pay him a specified sum for his services, from which judgment a vacation appeal was taken by the debtor, the succeeding receiver was a necessary party to such appeal, under a statute requiring all persons named in and affected by the judgment from which a vacation appeal is taken to be made parties." (Syllabus.)

In the opinion (p. 653) it is said:

"The judgment from which this appeal was taken was rendered against the Central Trust Company, as receiver. The receiver represents the interests of creditors, as well as those of the embarrassed debtor, and *an orderly administration of his trust requires such receiver to be a party to every proceeding affecting the estate in his custody.* The right of appeal is wholly statutory, and our statutes authorizing appeals require all persons named in and affected by a judgment from which a vacation appeal is taken to be made parties. The Central Trust Company, as receiver, was a necessary party to this appeal, and failure to join it is ground of dismissal. *Moore* v. *Ferguson,* 163 Ind. 395, 72 N. E. 126; *Crist* v. *Wayne Assn.,* 151 Ind. 245, 51 N. E. 368; *Stults* v. *Gibler,* 146 Ind. 501, 45 N. E. 340; *Roach* v. *Baker,* 145 Ind. 330, 43 N. E. 932, 44 N. E. 303; *Shuman* v. *Collis,* 144 Ind. 333, 43 N. E. 257; *Lee* v. *Mozingo,* 143 Ind. 667, 41 N. E. 454, and cases cited."

This case is affirmed in 79 N. E. 491.

Twitchell v. *Weil* (1897), 6 Kan. App. 53; 49 Pac. 634.

"A receiver appointed to take charge of the property of an insolvent debtor, who was a necessary party herein, since the institution of these proceedings in error, must be made a party in this court, or there is a defect of parties." (Syllabus.)

In the opinion (p. 635) it is said:

"Under the authority of *Scannell* v. *Felton,* 57 Kan. 468, 46 Pac. 948, these receivers are necessary parties in this court, and, in their absence, the petition in error must be dismissed."

Rache v. *Stanley* (1897), 15 Utah 314; 49 Pac. 648.

"Plaintiff obtained a judgment by default on foreclosure of a mortgage on realty against S. as receiver of a partnership and T. as administratrix. The money for which the mortgage had been given was received and used by the partnership, and the land mortgaged was partnership land. The administratrix was the wife of one of the partners, and a deficiency judgment was entered against her. Upon appeal the administratrix failed to serve notice on S., the receiver. Held, that S. was an adverse party under section 3636, Comp. Laws 1888, and that the failure to serve him with notice was fatal to the appeal." (Syllabus.)

In the opinion (p. 649) it is said:

"The receiver of the partnership of Thompson Bros. was clearly an adverse party, and the failure to serve him with notice is fatal to the appeal. The same question was presented and discussed with some care in the case of *Commercial Nat. Bank* v. *United States Savings, Loan & Building Co.* (Utah), 44 Pac. 1043, and on the authority of that case the appeal herein is dismissed."

Mosler v. *State Bank of Perry* (1897), 6 Kan. App. 172; 51 Pac. 309.

"A receiver of an insolvent bank, duly appointed under the banking laws to take charge of its assets, is a necessary party to a proceeding in error in this court to reverse a judgment rendered in favor of the bank against an interpleader who sought to receive certain property in the hands of said receiver, and claimed as a part of the assets of said bank." (Syllabus.)

In the opinion it is said (p. 310):

"From the case made, as well as from the brief of the plaintiffs in error, it appears that

the receiver of the bank was the real party in interest adverse to the plaintiffs in error, and as such, under the authority of *Scannell* v. *Felton,* 57 Kan. 470, 46 Pac. 948, was a necessary party to a review of the judgment herein. See, also, *Talmage* v. *Pell,* 9 Paige, Ch. 410; also, *Twitchell* v. *Weil* (recently decided by this court), 49 Pac. 634. These proceedings in error will be dismissed."

Pacific Coast Trading Co. v. *Bellingham Bay Baseball Ass'n* (1897), 18 Wash. 245; 51 Pac. 382.

"The receiver of an insolvent corporation, appointed on petition of certain judgment creditors of such corporation, was a proper party to plaintiff's appeal from a judgment finding that plaintiff's claim against the common debtor was barred by limitations, and ordering the receiver to distribute the fund among such judgment creditors, and was entitled to notice of such appeal." (Syllabus.)

In the opinion it is said (p. 382):

"The receiver was a proper party, and entitled to be served with notice. It follows that the motion must be granted, and the appeal dismissed."

III.

The Petition for Writ of Mandamus Should Be Denied for the Following Reasons:

A. The circuit court of appeals has no original jurisdiction. Its jurisdiction is entirely appellate and it has no power to issue writs of mandamus except as ancillary or auxiliary to its appellate jurisdiction.

"The test of appellate jurisdiction in the exercise and aid of which the courts of appeals may

issue writs of mandamus is the existence of that jurisdiction, not its prior invocation. *It is the existence of a right to review by a challenge of the final decisions or otherwise in the cases or proceedings to which the application for the writs relate.*

Barber Asphalt Pav. Co. v. *Morris,* (Circuit Ct. of Apps. 8th Circuit), 132 Fed. 945.

"We think it is the true rule that where a case is within the appellate jurisdiction of the higher court a writ of mandamus may issue in aid of the appellate jurisdiction which might otherwise be defeated by the unauthorized action of the court below."

McClellan v. *Carland,* 217 U. S. 268; 54 L. Ed. 762, 766.

"Under federal practice the writ may be employed in aid of appellate jurisdiction and the Circuit Court of Appeals is authorized to invoke its assistance in appropriate cases. The writ so employed extends to jurisdiction which might otherwise be defeated by the unauthorized action of the lower court."

In re Dennett (Circuit Ct. of Apps. 9th Cir.), 215 Fed. 673, 677.

"The right in this court to issue writs of mandamus is incidental to other powers expressly conferred; and it need not be said that since the power to review simply a question of jurisdiction in the court below does not reside in this court, there is nothing to which the right to issue such a writ can be said to be an incident."

United States v. *Sessions* (Circuit Ct. of Apps. 6th Cir.), 205 Fed. 502.

1. It is only when the jurisdiction which might be exercised by the Circuit Court of Appeals to re-

view an *appealable judgment or order* is defeated or impaired by an interlocutory order of the District Court that the Circuit Court of Appeals *can* issue a writ of mandamus to control the action of the District Court.

> *Barber Asphalt Pav. Co.* v. *Morris, supra; McClellan* v. *Carland, supra.*
>
> "The writ so employed extends to jurisdiction *which might otherwise be defeated* by the unauthorized action of the lower court."
>
> *In re Dennett, supra.*

See, again,

> *United States* v. *Sessions, supra.*

2. Neither the order of the District Court continuing proceedings before it for one week nor that directing that new parties be brought in tends to defeat or in anywise hinder or impair the appellate jurisdiction of this court to review any appealable order or judgment which may be hereafter rendered in the action.

The complainant's right to proceed to decree has not been affected in anywise by either of the orders complained of nor has either of those orders in anywise affected the power of this court to review the decree which shall be finally entered in the action.

B. The cases relied upon by the appellant to sustain its petition for mandate are inapplicable.

This proposition will be considered separately later. Suffice it here to say that the cases relied upon

by the appellant in this connection were all of them cases where the order of the lower court effectually prevented the plaintiff in the action from procuring a judgment *on the merits* in the action.

C. Mandamus cannot be used to perform the office of an appeal or writ of error. This rule applies even in cases where no appeal or writ of error is allowed by law.

> "The accustomed office of a writ of mandamus when directed to a judicial officer, is to compel an exercise of existing jurisdiction, but not to control his decision. It does not lie to compel a reversal of a decision either interlocutory or final made in the exercise of a lawful jurisdiction especially where in regular course the decision may be reviewed upon a writ of error or appeal."
>
> *Ex parte Rowe,* 234 U. S. 70; 58 L. Ed. 1217.

> "The refusal of a federal circuit court to remand a civil cause to the state court whence it had been removed as presenting a separable controversy between citizens of different states, cannot be reviewed by mandamus *which may not be used to perform the office of an appeal or writ of error."*
>
> *Ex parte Harding,* 219 U. S. 363; 55 L. Ed. 252. (Syllabus.)

> "The writ of mandamus cannot be issued to compel the court below to decide a matter before it in a particular way or to review its judicial action had in the exercise of ultimate jurisdiction. *The writ cannot be used to perform the office of an appeal or writ of error even if no appeal or writ of error is given by law."*
>
> *In re Rice,* 155 U. S. 396; 39 L. Ed. 198, at 201.

1. The order of the Circuit Court directing new parties to be brought in was one made in the exercise of its jurisdiction. If proper or valid the cause was not ready for trial, and since neither the propriety nor the validity of the order may be considered on mandamus the petition for that writ must be denied. This question may be more appropriately considered under prohibition, and we there consider it.

See, however, *in re Pollitz,* 206 U. S. 323; 51 L. Ed. 1081, wherein the Supreme Court denied a petition for a writ of mandate to compel a circuit court to remand to the state court a cause which the circuit court had refused to remand because of its opinion that the case presented a controversy between the removing defendant and the plaintiff which could be fully determined between them without the presence of the other defendants. The case cited presents the converse of the case at bar for in it the court refused to mandamus the Circuit Court to remand a case of which the Circuit Court properly took jurisdiction if it were correct in its conclusion that *certain parties were not necessary.* In the pesent proceedings the trial court has concluded that the *presence of certain parties is necessary.* This is a judicial determination which the District Court had the power to make and its order cannot be reviewed by mandamus.

D. Mandamus is an extraordinary remedy granted only in extraordinary cases and dependent also on the exercise of a wise judicial discretion. For this reason alone it should be denied in the present case.

> "Mandamus, although it has become now a civil suit, is of a prerogative nature, and is strictly an extraordinary remedy granted only in extraordinary cases and dependent also upon the exercise of a wise judicial discretion."
>
> *In re Welch Mfg. Co.* (Circuit Ct. of Apps. 1st Circuit), 201 Fed. 519, 520.

1. If this court should establish a precedent of reviewing on petitions for mandamus orders of the character here sought to be reviewed, that extraordinary remedy would be used as the equivalent of an appeal and the time of this court would be taken up in disposing of applications for such writs to control the discretion of the district court.

IV.

The Petition for a Writ of Prohibition Should Be Denied for the Following Reasons:

A. The Circuit Court of Appeals has no ORIGINAL jurisdiction. Its jurisdiction is entirely appellate and it has no power to issue writs of prohibition except as ancillary or auxiliary to its appellate jurisdiction.

In *Zell* v. *Judges of the Circuit Court* (Circuit Ct. of Appeals, 4th Circuit), 149 Fed. 86, the syllabus reads as follows:

> "A circuit court of appeals has no power to issue a writ of prohibition as an original or independent proceeding, but only in aid of its own jurisdiction which is wholly appellate, and except in cases of petitions for review in bankruptcy proceedings, can only be revoked by an appeal or writ of error. Nor can it issue such

writ as ancillary to a contemplated appeal or writ of error."

In the opinion it is said (p. 91):

> "We are of the opinion that every case of which this court can take jurisdiction, except petitions relating to bankruptcy proceedings, must be brought to it by either appeal or writ of error. It has no power to issue the writ of prohibition as an original or independent proceeding, and it has no right to issue it as ancillary to a contemplated writ of error or appeal, though it is quite apparent that cases may present themselves, after a writ of error or appeal has been perfected, in which it would not only be proper but absolutely necessary that such writ should issue in aid of its jurisdiction."

A petition for a writ of *certiorari* to review the judgment of the Circuit Court of Appeals was denied by the Supreme Court.

> See 204 U. S. 669; 51 L. Ed. 672.
> See, also, *In re Paquet* (Circuit Ct. of Apps. 5th Circuit), 114 Fed. 437.

1. It is only where the appellate jurisdiction of the Circuit Court of Appeals has been interfered with by the action of the District Court that prohibition will lie.

This follows necessarily from the fact that the power of the Circuit Court of Appeals to issue writs of prohibition is only incidental to its appellate jurisdiction.

2. The order of the District Court directing that

new parties be brought in in no wise interfered with the appellate jurisdiction of this court.

(a) At the time the application for writ of prohibition was made to the Circuit Court of Appeals, the appellate jurisdiction of that court had not been invoked; therefore, this court has no power to issue a writ of prohibition since there was no existing appellate jurisdiction to which the writ of prohibition could attach as an incident.

In re Paquet, supra;
Zell v. *The Judges, supra.*

(b) The rule which now applies in mandamus proceedings that it is not necessary before the issuance of the writ that the jurisdiction of the Circuit Court of Appeals *shall have been actually invoked* if the action of the District Court is such as tends to defeat or impair an appellate jurisdiction which may be thereafter invoked, does not apply in prohibition.

Mandamus reviews *inaction;* prohibition reviews *action.* The refusal of a district court to proceed in a case so that a party might have a judgment on the merits would, if persisted in, prevent the party from ever invoking the appellate jurisdiction of the circuit court of appeals and may, therefore, be said to be an interference with the appellate jurisdiction of that court. The order of a district court, however, ordering new parties to be brought in to the action, does not affect the right of the complainant to proceed to a decree upon the merits nor the right of this court to review the decree when rendered. Unless, therefore, there is a pending appeal to preserve the jurisdiction of which a writ of prohibition is necessary, such writ should be denied

B. The case relied upon by the petitioner is inapplicable. This point we will specifically deal with

later. We here note the fact, however, that in *United States* v. *Mayer,* 235 U. S. 55; 59 L. Ed. 129, a writ of error was pending in the Circuit Court of Appeals at the time the District Court made an order vacating a judgment from which the appeal had been taken and which, of course, if not set aside would have deprived the Circuit Court of Appeals of jurisdiction of the appeal for the reason that the appeal from the judgment would fall with the vacating of the judgment.

C. No orders can be reviewed upon prohibition except such as are in excess of jurisdiction. An order even though erroneous if made in the exercise of jurisdiction is not reviewable on prohibition.

Ex parte Gordon, 104 U. S. 504; 26 L. Ed. 814;
Matter of the State of Pennsylvania, 109 U. S. 174; 27 L. Ed. 894;
Smith v. *Whitney,* 116 U. S. 167; 29 L. Ed. 601;
Matter of Fassett, 142 U. S. 479; 35 L. Ed. 1087, 1090;
Alexander v. *Crollott,* 199 U. S. 580; 50 L. Ed. 317.

In *Pope Mfg. Co.* v. *Arnold Schwinn & Co.,* 208 Fed. 406, the syllabus reads as follows:

> "An alleged error in the taxation of costs in a suit in which the court had jurisdiction of the subject-matter and the parties cannot be reviewed by a petition for a writ of prohibition, *which is a collateral attack and can prevail only where the court was without jurisdiction to render the judgment or make the order complained of.*"

1. Under equity rule 37 the court had *power* to order in *necessary parties.*

Equity rule 37 provides in part that "any person may at any time be made a party if his presence is *necessary* or *proper* to a complete determination of the cause."

We shall hereafter point out that this rule promulgated November 4, 1912, marks a new departure in equity pleading and effectually distinguishes the cases relied upon by the petitioner.

2. The court having possession, through its receivers, of the property of the Western Pacific Railway Company, had the *power* to order all persons brought in whose presence was necessary to a complete determination of the possession, control and disposition of that property.

> *Krippendorf* v. *Hyde,* 110 U. S. 276; 28 L. Ed. 145.

In *Morgan's La. & Texas R. R. & Steamship Co.* v. *Texas Central Ry. Co.,* 137 U. S. 95; 34 L. Ed. 625, it is said (p. 636):

> "The property was in the actual possession of that court (Circuit Court) and this drew to it the right to decide upon the conflicting claims to its ultimate possession and control."
>
> See, also, *Gumpel* v. *Pitkin,* 124 U. S. 131; 31 L. Ed. 374;
>
> *Milwaukee & Minn. R. R. Co.* v. *Soutter,* 69 U. S. 609; 17 L. Ed. 886, 895.

See, particularly, *Compton* v. *Jessup,* 68 Fed. 263, wherein in reply to an argument that although in a

case where a court had possession of property through its receivers it had power to *permit* a person to intervene for the protection of its rights, it had no power to *compel* such person to come in, the court speaking through Taft, J., said:

> "The argument is that the right of the federal court to grant relief to persons claiming an interest in property in its custody, without regard to their citizenship, is founded on its duty to prevent an abuse of its process to the prejudice of strangers to the suit, and is dependent on the wish of such strangers to secure that relief, expressed in an affirmative and voluntary appeal for the aid of the court, and that no power exists in the court to compel such a stranger to come into court, against his will, simply because he claims an interest in the property impounded, if his citizenship would prevent the issue of such process against him in the original suit. Let it be conceded, for the purpose of the argument, that the distinction made is a sound one. It does not help Compton. He was not brought into court to prevent prejudice to him by the federal court's possession of the *res*. He was brought into court to prevent prejudice to Knox and Jesup, who, otherwise having no right to invoke the action of the federal court, did so on the ground that its possession of the *res* prevented their getting full and adequate relief in the state tribunals, and who were therefore entitled to bring into the case every one whose presence as a party was necessary to give them such relief. They had the right to have the railroad sold free from all liens, so that the purchaser should have an unclouded title, and this could not be done without Compton's presence."

Mercantile Trust Co. v. *Atlantic & Pac. R. R. Co.*, 70 Fed. 518, was a proceeding similar to the

case at bar. Ross, J., sitting as circuit judge, denied an application for leave to bring an independent suit by a second mortgagee *upon the ground that the property being in the possession of the court through its receivers,* the court had the right to bring in all persons interested in the property.

Speaking of persons made defendants in the proposed independent bill and who were not parties to the original bill, Judge Ross says:

> *"The Court itself may and always would order them brought in if they should at any time pending the suit appear to be necessary parties to its proper determination."*

See, also, *Newton* v. *Gage,* 155 Fed. 598, wherein the decision of Judge Ross is approved at page 607.

(a) The ordinary rules of equity pleading with reference to parties do not apply in a case where the court has taken possession of property through its receivers. In such a case the court has power *by mandatory injunction to compel* third persons to come in and litigate their claims with respect to the property in the possession of the court.

See, *People's Bank* v. *Winslow,* 102 U. S. 256; 26 L. Ed. 101.

The facts in this case were these:

Calhoun and Updyke filed in the Circuit Court a suit to foreclose a railroad mortgage and also asked for the appointment of a receiver to take possession of the road. The latter order was granted. While the suit was pending in the Circuit Court, the People's Bank (plaintiff in error) brought a suit against Winslow and at-

tached a portion of the property already in the possession of the receivers. Thereupon the complainant in the foreclosure suit applied to the Circuit Court to enjoin the People's Bank from the further prosecution of its attachment suit. No disposition seems to have been made at this attachment for the reason that the parties to the application suit stipulated that it might be removed to the Circuit Court.

Speaking of the stipulation for removal to the federal court, Mr. Justice Miller says:

"The plaintiff was attempting in the state court to enforce a lien on the railroad by judicial sale which was a rival and conflicting lien to that of Calhoun and Updyke who were proceeding in the federal court to sell the same property under their lien. The latter court had not only obtained jurisdiction of the question of lien prior to the initiation of plaintiff's suit, but it had taken possession of the property by its receiver. It had thus drawn to itself the subject matter of the litigation and the right to decide upon the conflicting claims to the possession and control of the road. . . . In consenting, therefore, to the voluntary transfer of the litigation from the state court into the federal court *the parties did no more than what they could have been compelled to do by the injunction of the latter, and what would have been done by such compulsory order if they had not submitted to it by agreement.*"

See, also, *Mercantile Trust Co.* v. *Atlantic & Pac. R. R. Co., supra,* and *Newton* v. *Gage,* 155 Fed. 598, 607, to the point that the ordinary rules of equity pleading are inapplicable *where the court has possession of the property affected by the suit.*

(b) The court having the power to order strangers to the litigation to be brought in to

litigate their rights with respect to the *property in the possession of the court,* had the incidental power to determine what constituted the property in the possession of the receivers. If it concluded that Contract B and the rights thereunder were property in the possession of the receivers its conclusion though erroneous could not be void and its order directing strangers to the litigation to be made parties to litigate their rights with respect to Contract B though it likewise might be *erroneous* could not be *void.*

This proposition is self-evident.

D. No case will be found where prohibition has been used for the purpose here sought.

1. We later deal with the case of *United States* v. *Mayer,* 235 U. S. 55, relied upon by the petitioner, and show it to be inapplicable. We merely here note in passing that in that case the Circuit Court of Appeals in which there was already pending an appeal from a judgment was held authorized *to protect its appellate jurisdiction* by preventing the lower court from making an order in excess of the latter's jurisdiction which would have destroyed the jurisdiction of the Circuit Court of Appeals.

E. Prohibition is an extraordinary writ and grantable of right only in cases where the court has CLEARLY no jurisdiction of the cause originally and no other remedy exists in favor of the petitioner. In all other cases the writ is grantable only as a matter of judicial discretion. The case here presented clearly is of the latter character and the petition for the writ should be denied.

See *In re Rice,* 155 U. S. 396; 39 L. Ed. 198, 201, wherein a petition for a writ of prohibition was denied as was likewise a petition for a writ of mandamus.

V.

The Argument of the Petitioner and Appellant Proceeds Upon Erroneous Principles and Is Attempted to Be Supported by Authorities Which Do Not Support It.

A. The argument that the District Court has no power of its own motion to order new parties brought in or to COMPEL a party before the court to bring in a stranger to the litigation proceeds upon principles of GENERAL EQUITY PLEADING inapplicable in the present case.

1. The rule that if necessary parties are not before the court, the court has no power to order them brought in but is limited to a dismissal of the bill if they are not brought in, has never been applied in a case where the court through receivers or otherwise *has possession* of the property affected by the pending litigation.

See, again,

Peope's Bank v. *Winslow,* 102 U. S. 256; 26 L. Ed. 101;
Mercantile Trust Co. v. *Atlantic & Pac. R. Co.,* 70 Fed. 518;
Newton v. *Gage,* 155 Fed. 598,

and other cases cited *supra.*

2. Independent of other circumstances, the rules of equity pleading relied upon by the petitioner and

appellant were changed by equity rule 37 adopted November 4, 1912, which in terms provides that—

> "Any person may at any time be made a party if his presence is necessary or proper to a complete determination of the cause."

B. The cases of Searles v. Jacksonville etc. Co., 2 Woods, 621 (Federal Cases No. 12,586), and Shields v. Barrow, 7 How. 130; 15 L. Ed. 158, cited by the petitioner to the proposition that the court has no power to order strangers to a litigation to be brought in, are inapplicable for the reasons (a) *that they were decided before the adoption of equity rule 37 which in terms grants such power to the court; and* (b) *that they involve the general rules of equity pleading which, as above shown, are inapplicable in a case WHERE THE COURT THROUGH ITS RECEIVERS HAS POSSESSION OF THE PROPERTY IN CONTROVERSY.*

C. The cases relied upon by the petitioner on its argument in support of its petition for mandamus are not in point.

1. The case of *McClellan* v. *Carland,* 217 U. S. 268, 54 L. Ed. 762, relied upon by the petitioner, was a case where the Circuit Court had continued the trial of an action pending before it until such time as the trial of another action pending in the state court should be concluded. The Supreme Court in holding that the Circuit Court of Appeals had power to grant a writ of mandate to compel the Circuit Court to proceed to trial did so upon the

ground that a litigant in the federal court had a right to the independent judgment of the federal court and that a continuance of a trial of an action pending in the federal court until such time as an action pending in the state court had been tried, would deprive a litigant of such right for the reason that the judgment in the state court would be *res judicata* on the parties in the controversy and thereby prevent a trial in the federal court on the merits. The court further held that inasmuch as the Court of Appeals would have the right to review a final judgment that might be rendered in an action in the Circuit Court of which right of review it would be deprived by the action of the Circuit Court, it had jurisdiction to issue a writ of mandate to compel the Circuit Court to proceed with the trial. The basis of the decision, therefore, was that the action of the Circuit Court would prevent a trial upon the merits and therefore prevent the Circuit Court of Appeals from exercising its appellate jurisdiction.

2. The case of *In re Rice,* 155 U. S. 396; 39 L. Ed. 198, does not support the position of the petitioner. In that case a petition for mandate was denied upon the ground that the Circuit Court had already proceeded to judgment in the premises and the judgment and proceedings of the court were in the exercise of its jurisdiction and therefore could not be controlled by mandamus.

D. The case of United States v. Mayer, 235 U. S. 55; 59 L. Ed. 129, relied upon by the petitioner in

support of its application for prohibition is not in point.

In this case one Freeman was on March 14, 1913, convicted of violation of the statutes relating to the use of mails. On the same day a judgment of conviction was entered and sentence was imposed. On March 24, Freeman sued out a writ of error to the Circuit Court of Appeals to review the judgment of conviction. Assignments of error were filed, and on May 13, 1913, Freeman was admitted to bail by the District Court. After the expiration of the term at which the judgment was entered, Freeman moved the court for an order setting aside the judgment, quashing the indictment and in the alternative for a new trial. The District Court having raised the question of its lack of jurisdiction to make the orders because of the expiration of the term at which the judgment was rendered, the attorney for the United States tendered his consent that the application be heard upon the merits. Thereupon argument was had and an order made granting Freeman a new trial on the ground that he had not had an impartial trial for the reason that one of the jurors had entertained a bias against him. Thereafter, on April 6, 1914, the United States Attorney procured an order in the Circuit Court of Appeals directing the district judge to show cause why a writ of prohibition should not be issued forbidding the entry of an order vacating the judgment of conviction and granting a new trial upon the ground that the District Court was without jurisdiction to enter it for the reason above stated, that the

term at which the judgment was entered had expired before any attempt was made to review the judgment. The Supreme Court of the United States on questions certified to it by the Circuit Court of Appeals held (a) that the District Court had no jurisdiction to enter the order vacating the judgment for the reason that that court lost jurisdiction of the judgment with the expiration of the term at which it was entered; and (b) that inasmuch as a writ of error was pending in the Circuit Court of Appeals from the judgment at the time that the District Court attempted to set aside the judgment, the Circuit Court of Appeals to protect its appellate jurisdiction had power to issue a writ of prohibition to prevent the entry of the order vacating the judgment. The decision, therefore, holds that in a case where the jurisdiction of the Circuit Court of Appeals has *already been invoked* that court will by prohibition restrain the District Court from making any order which would interfere with the appellate jurisdiction of the Circuit Court of Appeals which has already attached. This is the extent of the decision.

E. Even prior to the adoption of present Equity Rule 37 and in a case where the property involved in a suit was not in the possession of the court through its receivers so that the court could not compel the complainant to sue parties whom he did not wish to sue, an order made by the court directing the complainant to bring in new parties would not be in excess of the court's jurisdiction. Such an order would be

erroneous but not void and could be reviewed only on appeal. Prohibition would not lie to prevent the enforcement of such an order nor would mandamus lie to compel the court to proceed with the trial notwithstanding such order.

VI.

Conclusion.

For the foregoing considerations it is respectfully submitted that—

1. The appeal from the order enjoining the further prosecution of the ancillary and dependent bill should be dismissed;

2. The petition for writ of mandamus should be denied;

3. The petition for writ of prohibition should be denied.

Respectfully submitted,

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Dated March 20, 1916.